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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 749 .

OVERSEAS TANKSHIP CORPORATION,

Petitioner,

—against—

GUY B. KEEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on February 5, 1952.

Opinion Below.

The opinion in the Court of Appeals for the Second Circuit has been reported in 194 F. 2nd 515 and appears at App. 37-45.*

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* All references are to pages. References to "Appendix for Petitioner" have "a" following page number as distinguished from references to "Appendix for Plaintiff-Appellant".

Jurisdiction.

Certiorari under Subdivision 1 of Section 1254, Title 28, United States Code, is appropriate because, although the order of the Court of Appeals is not a final judgment, it presents important questions of law and issues "fundamental to the further conduct of the case."

> *United States* v. *General Motors Corporation*, 323 U. S. 373, 377;
> *Land* v. *Dollar*, 330 U. S. 731, 734.

Support for this statement is to be found in the authorities cited in support of this petition.

Questions Presented.

1. Whether the owner's warranty of the seaworthiness of his vessel extends to members of the crew for the competency of their fellow crew members in the same manner as with respect to hull and gear.

2. Whether, under general maritime law, an owner's responsibility for the seaworthiness of his vessel includes responsibility to a member of the crew for injuries sustained when assaulted by a temperamentally unfit crew member in the absence of knowledge by the owner direct or imputable of such unfitness.

3. Is the owner of a vessel an insurer against an injury being inflicted by a temperamentally unfit crew member upon a fellow crew member?

4. Whether a statement of law by the trial judge outside the presence of the jury and held to be incorrect upon appeal constitutes reversible error where it is unaccompanied by any ruling or order of the trial court.

5. Whether the reversal of the judgment after an extended jury trial can be predicated solely upon a statement of law made by the trial judge during a colloquy between court and counsel outside the presence of the jury and unaccompanied by any specific ruling by the court or exception of counsel in the event an appellate court should later hold that such statement was an incorrect expression of the law.

Statement.

Respondent and John Mruczinski, were both members of the crew of the "Meuse Argonne," a tanker owned and operated by petitioner. The respondent signed on as an able-bodied seaman and Mruczinski as the second cook. While the ship was in Manila, P. I., Mruczinski and respondent went ashore on leave and came back to the vessel on the same launch. Mruczinski was drunk, and there is evidence that respondent was also drunk. The two got into a quarrel, either on the launch over respondent's supposed failure to pay Mruczinski a gambling debt, or over Mruczinski lighting a cigarette after they had boarded the ship. In the scuffle which followed, the respondent struck Mruczinski knocking him to the deck. Mruczinski picked himself up, went to the galley, got hold of a meat cleaver, and hit Keen on the head, causing a fractured skull (App. 38).

Suit was brought by respondent against petitioner, alleging liability on the theory either of petitioner's negligence or the unseaworthiness of its vessel.

Both theories were grounded upon the alleged vicious propensities of Mrucznski. At the trial the evidence on this issue was conflicting. Respondent went further and near the end of his case attempted, through a witness named Moore, to show that Mrucznski was actually insane (App. 98a-110a). In the course of his examination of Moore the trial judge excused the jury and a discussion followed between the judge and counsel as to rules of evidence relating to the proof of insanity (App. 110a-119a). At the conclusion of this colloquy the respondent's counsel argued that proof of the insanity of Mrucznski alone was sufficient to establish petitioner's liability (App. 118a-119a). The trial judge expressed his disagreement with this proposition and stated in effect that he did not regard petitioner as an insurer against injuries sustained by a member of the crew resulting from the vicious propensities of another member of the unlicensed personnel, and further that in a case of this nature he regarded the proof in an action for indemnity under the maritime law to be the same as for negligence under the Jones Act (46 U. S. C. § 688). No ruling upon the evidence and no order of any kind by the trial judge was made as a result of this statement, no exception was taken thereto and the examination of the witness Moore continued (App. 119a *et seq.*).

After an extended trial lasting eleven trial days the case was submitted to the jury which returned a verdict for petitioner. The respondent appealed to

the Court of Appeals which reversed and directed a new trial. The reversal of the judgment was based *exclusively* upon the one statement of the trial judge to which reference has just been made (App. 43-44). The Court of Appeals contended that the trial "judge had made it entirely clear that he did not think that Mruczinski's temperamental unfitness for his duty was a ground of liability unless it came to the defendant's knowledge". It held this to be an incorrect expression of the law and that the correct principle was one of liability without fault. It held that the responsibility of the owner to members of the crew for assaults by unlicensed members of the crew was precisely the same as responsibility with respect to injuries from defective hull and appliances, and that, therefore, if a jury were to find that Mruczinski was temperamentally unfit for his duties liability would follow irrespective of the owner's knowledge direct or imputable of such unfitness.

The court recognized that other Circuits had expressed a different rule and that in no previous decision had liability been imposed in the absence of the owner's knowledge, direct or imputable, of the seaman's temperamental unfitness, but justified the result on the ground that the owner could carry insurance, the premiums for which would ultimately be paid by shippers (App. 42-43).

In its opinion the Court of Appeals adverts at length to that portion of the trial judge's charge to the jury to the effect that the shipowner was under no duty to inquire or examine into, nor was it an insurer of, the mental or physical condition of a prospective employee; that the presence among crew members of a seaman of violent, vicious pro-

pensities would constitute a menace to his fellow seamen, and that if the fact of his temperament was known to his officers or should have been known to them they were obliged to use reasonable care to remove the peril (App. 15). The Court of Appeals held this to be an incorrect statement of the law and stated that had the respondent excepted thereto it would not have hesitated to reverse the judgment on that ground but that it could not do so since the "respondent was content with the charge" (App. 43). The court then apparently searched the record to find a possible basis for reversal elsewhere and seized upon the expression of the trial judge during the course of the colloquy referred to above, disregarding the fact that it was made outside the presence of the jury, was unconnected with any ruling and when later repeated in the charge was accepted by the respondent (App. 44).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that petitioner was liable for an assault upon respondent by a fellow crew member in the course of a private quarrel upon a mere showing that the assailant was a person of vicious propensities or otherwise temperamentally unfit for duty and without the necessity of establishing that petitioner knew or had reason to know of such propensities or unfitness.

2. In holding that an isolated statement of law by the trial judge in the course of an extended jury trial constituted reversible error when made during a col-

loquy between court and counsel outside the presence of the jury and unaccompanied by any ruling or order of the court or exception of counsel.

3. In reversing the judgment of the District Court.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals in the instant case is directly in conflict with the decision of the Circuit Court for the Fifth Circuit in *The E. B. Ward, Jr.*, 20 Fed. Rep. 702. In that case a seaman was denied recovery for injuries which he sustained through the negligence of his fellow employees. After announcing the common law rule that the master is not liable to his servant for the negligence of a fellow servant, the court went on to deny recovery on the basis of general maritime law and in that connection stated the law to be as follows:

> "* * * Nor does the master warrant the competency of any of his servants to the others. * * * In the admiralty, no more than elsewhere, should the owner, without fault himself, be held as a general warrantor of the competency of any of his servants to the others, all alike engaged in the common employment of navigating the ship. * * *"

The holding in that case was followed by the District Court for the Southern District of Alabama in *The Lizzie Frank*, 31 Fed. Rep. 477. In that case, Judge Toulmin stated:

> "Seaworthiness includes a competent crew. Yet the owner does not warrant to each seaman the competency of the others. *The E. B. Ward*, 20 Fed. Rep. 704; *Dixon* v. *The Cyrus*, 2 Pet. Adm. 411."

This conflict was conceded by the court below when it stated, in its opinion (App. 42):

> "It is true that in two early cases Judges certainly did use language which is counter to what we are holding."

Actually more than a difference in language was involved, since in both cited cases recovery was denied on the basis of the law as quoted.

The holding of the Second Circuit is also in conflict with the statement of the law on this subject by the Ninth Circuit in *The Rolph,* 299 Fed. Rep. 52, 55:

> "From these and many other decisions in which the Courts have discussed the duty of the shipowner, we conclude that it is but reasonable to say that a ship is not properly equipped for a voyage where the mate is a man *known* to be of a most brutal and inhuman nature; one *known* to give vent to a wicked disposition by violent, cruel and uncalled for assaults upon sailors." (Italics supplied.)

The decision of the Ninth Circuit in *The Rolph* case cannot be read other than as holding that knowledge by the shipowner, direct or imputable, of the vicious propensities of the mate was an essential ingredient of liability. It is, moreover, a far cry from imposing liability for an assault by a mate with a long record of brutal, violent, and inhuman treatment of seamen, as in *The Rolph* case, to the imposition of liability for an assault by one crew member upon another in the course of a private quarrel while both were more or less under the influence of alcohol and without any showing that

the owner knew or had any reason to know that one of the parties to the quarrel was a person of vicious propensities or otherwise temperamentally unfit for duty.

Finally, the instant case appears to be in conflict with relatively recent decisions in the same Circuit. In *Kable* v. *United States*, 169 F. 2d 90, the Second Circuit in affirming the dismissal of a libel based upon an assault upon a chief officer by a chief engineer of the vessel distinguished earlier decisions dealing with liability for unseaworthiness, including *The Rolph* case, *supra,* by stating (p. 92):

> "* * * For in those cases the evidence convincingly established that the person committing the assault for which the shipowner was ultimately held liable had *known* vicious propensities. Quite the contrary is the situation before us." (Italics supplied.)

See also:

> *Brailas* v. *Shepard SS Co.,* 152 F. 2d 849, 850, cert. denied 327 U. S. 807.

The Bench and Bar had accepted the authorities cited above as firmly establishing the rule that liability could be imposed only where prior knowledge, direct or imputable, existed of the vicious propensities of the assailant. The instant case departs from that principle and is contrary to the decisions in the Fifth and Ninth Circuits as well as repudiating the previous decisions in the Second Circuit.

While the Court of Appeals does not admit this much it does recognize that it has extended the doc-

trine of seaworthiness to a point beyond any previous application of the principle. Thus it states in its opinion (App. 41):

> "It must be owned that we have not found any decision which deliberately decided that an owner is responsible for the seaworthiness of his ship in respect of personnel in the same sense that he is in respect of hull and gear; and, strictly, the point is *res integra.*"

2. The question presented is of great importance in the administration of the general maritime law. By making the owner an insurer of the physical, mental and temperamental character of each member of the crew, not only in their relations to the public, but in their relations to each other, the court widely extends the liability of steamship owners, insurers, shippers, stevedoring companies and ultimately the general public.

The decision has profound judicial, economic and social implications. For the first time the owner is held liable for injuries sustained during private quarrels between members of the crew which it was impossible to prevent or avoid.

Liability is imposed for signing on one who was temperamentally unfit although his "appearance does not betray his disposition." A new type of workmen's compensation has been judicially created:

> "But suppose there will be many such instances; that is no reason why an individual seaman who has suffered because his fellow is not up to his work, must bear the loss. Substantially all maritime risks are insured, and if we must suppose that the addition of this risk will show in the

premiums, in the end it will be likely also to show in freight rates; and so far as it does, the recovery will be spread among those who use the ships" (App. 43).

This far-reaching and revolutionary principle, ostensibly based on the rule of unseaworthiness, in fact charters a new course in the law of seamen. Even granting that Congress in writing the Jones Act (46 U. S. C. § 688) did not intend to pre-empt the entire field of employer's liability to seamen, it could hardly have intended that the courts would extend to seamen rights transcending those based upon fault by enlarging the maritime doctrine of seaworthiness.

In the final analysis, this is precisely what the Court of Appeals has done; it has enunciated a new doctrine of liability without fault. It is respectfully submitted that such a drastic extension of the doctrine of seaworthiness in the face of the Jones Act is properly a matter of legislation and not judicial determination. Judicial dissatisfaction with the limitations of Jones Act negligence is hardly justification for creation of new liabilities extending far beyond the expressed Congressional policy.

Compare:

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 72 S. Ct. 277, 280, 96 L. Ed. 217.

The Court of Appeals necessarily concedes that the owner has no way to protect himself except by insurance. Mere investigation and care in the selection of employees no matter how painstaking would be ineffective assuming the widest latitude of the em-

ployer to pick and choose. It is obvious that powerful labor organizations representing the prospective employee would resist any selection made on a basis as tenuous as temperamental unfitness. The rejection of a seaman of doubtful or questionable competence would mean that no other steamship owner could safely hire him. No labor organization would permit such blacklisting. The inappropriateness of stretching the doctrine with respect to defects in hull and gear to personnel is thus exposed. The owner has always complete freedom to discard the doubtful hull or appliance. Human beings are not and should not be susceptible to similar disposition.

It is respectfully submitted that this Court should not permit the rule announced in this case to become ingrained in the law but should review it at the earliest moment and permit it to stand or repudiate it only upon a full review of all the relevant considerations.

3. The reversal of the judgment rests entirely upon an alleged incorrect statement of law by the trial judge to counsel in the course of a colloquy between court and counsel outside the presence of the jury and unaccompanied by any ruling, order or action adverse to respondent. As such, the statement of law, even if in error, was harmless. The reversal, therefore, disregards the admonition of Rule 61 of the Federal Rules of Civil Procedure and the fundamental principle that, to constitute reversible error, there must be substantial prejudice.

Dimmitt v. *Breakey* (C. C. A. 5), 267 Fed. Rep. 792, 794, cert. denied 254 U. S. 641;
McComb v. *McCormack* (C. C. A. 5), 159 Fed. 2d 219, 227.

It is not contended that the statement did not relate to an important consideration in the case. However, there is no basis whatever for assuming that respondent suffered any substantial prejudice from the mere fact that the statement was made. Respondent continued with his examination of the witness as theretofore. He was accorded full latitude to establish the insanity of Mruczinski by competent evidence. Under the circumstances, the statement of the trial judge was even more innocuous than the harmless error contemplated in Rule 61. That rule presupposes either the admission or exclusion of evidence or some ruling or order or thing done or omitted to be done by the trial court. Nothing of that sort occurred in the instant case.

The integrity of a jury verdict after an extended trial is not to be destroyed by what amounts to nothing more than an isolated expression of the law later found to be incorrect. The respondent cannot be heard to complain. The real harm, if any, occurred when the trial judge, in its charge to the jury, repeated, in substance, that which the Court of Appeals struck down as error when made in the colloquy. The respondent, in the words of the Court of Appeals, "was content with the charge" and did not except thereto. Had he done so, the Court of Appeals states that it would not have hesitated to reverse on the charge. The Court accomplished the same result, however, by searching the record to find in the colloquy what it held to be a similar incorrect statement of the law, without any attempt to show that a substantial right of the respondent was affected by the making of such statement.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER KEBER,
Counsel for Petitioner.

MORGAN J. BURKE, JR.,
DORSEY, BURKE & KEBER,
Of Counsel.

May 2, 1952.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HENRY FOGLER,
Counsel for Respondent.

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POINT I. By statute appeals to the Supreme Court from a Circuit Court of Appeals can be only from final judgments or decrees. It is well settled that an order granting a new trial does not dispose of the case but leaves it open to the party to retry his case, and such an order is not appealable..... 1

POINT II. A. Petitioner is misleading this Court when it states that the issue of insanity was raised but by one small isolated ruling. The opening address of the plaintiff to the jury which devoted a substantial part to the insanity of Mruczinski put the petitioner and the Court on notice as to plaintiff's claim for indemnity based on Mruczinski's insanity and the proof of insanity to be offered.

The Court specifically ruled shortly after the trial was begun in answer to an exception taken by plaintiff that thereafter exceptions need not be taken to adverse rulings.

During the trial when the Court suppressed evidence bearing on Mruczinski's insanity and in effect overruled what it had previously ruled in plaintiff's opening address, it was fully aware that the rulings were adverse to plaintiff's principal contention in the case..... 6

POINT II. B. Petitioner by misleading the Court of Appeals that no exception was taken to the erroneous portion of the charge, succeeded in having this read into the opinion. Petitioner now seeks to mislead this Court when it knew that portion of the charge was taken bodily from petitioner's request No. 2 to charge and that the Trial Court granted a specific exception and even made sure that the exception was reserved after the charge..... 9

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POINT III. A. It would be unfair to the seaman to permit this case to be reviewed at this time where Judge Hand with a unanimous Court ruled that because of rules of evidence peculiar to the law of the State of New York, the trial judge had made erroneous rulings in failing to admit records bearing on Mruczinski's insanity 10

POINT III. B. Certiorari would be unfair at this time without a retrial of all the issues because it was not known until after the trial that the reason why the entire steward's department was incompetent according to the overwhelming evidence in behalf of the defendant was because the defendant was interested only in getting about 40 of the American surplus tankers which it had placed under the Panamanian flag across to the Orient where the Americans were replaced by Chinese who brought high octane gasoline and oil to the Communists (Exhibit A) 13

POINT IV. The opinion is in line with the law expressed in the Second Circuit as well as the Third and Ninth Circuits. There is no conflict. In fact is closely follows the recent *Spellman* case of the Third Circuit Court of Appeals.

To ascribe to Judge Learned Hand, Chief Judge Swan, and Judge Augustus Hand who have made the most substantial contributions to the admiralty law, an intent to overrule that eminent court's own decisions without a forthright statement to that effect is merely unthinkable. The opinion written with customary thoroughness and erudition delves into every authority.

A. To show unseaworthiness due to an incompetent captain in line with the *Spellman* case in the third circuit, and unseaworthiness due to incompetency of the entire steward's department in line with the ninth circuit, we call attention to Point II-B and Point II-C of our Brief in the Court of Appeals, as follows:..... 16

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B. On defendant's own testimony and indeed the basis of its defense that the assault aboard ship arose out of gambling aboard ship, the vessel was unseaworthy because the proof showed that the captain was not competent since he permitted full scale gambling to continue, and enforced no discipline, and when advised that Mruczinski had taken a gun and put it into a crew member's ribs shortly before the assault on the plaintiff he did not even investigate the facts surrounding the gun incident 16

(a) No qualifications of the Captain were shown other than that this was the first white crew that he had since 1943..... 17

(b) He specifically admitted that the only crew that he had handled were Indians and Chinese whom he preferred..... 17

(c) Although there is some question as to the exact time when he heard the rumor that Mruczinski had put a gun into Smith's ribs a fair reading of the deposition disclosed that it must have been prior to the time of the assault upon Keen..... 17

C. Aside from plaintiff's overwhelming evidence even on defendant's own testimony the unseaworthiness due to an incompetent steward's department was fully established. The testimony by deposition of the steward, the master, and Mruczinski established that not a single, solitary member of the steward's department was competent 18

(a) Steward testified that the two messmen and the utility men were inexperienced..... 18

(b) The Captain had testified that he recalled that the messman and the utility man wanted to get off the ship in England because of the Steward and it could have been because of the Steward and Mruczinski..... 19

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(c) Mruczinski, the second cook, stated that the reason he made the trip was to get some experience so that he could get into the Union 19

(d) According to Mruczinski, messman Smith with whom he had a fight didn't give the men good service. This fight was right near the Captain and the Steward stopped it. It was then stated that the Captain and the Steward stopped the fight..... 19

(e) The testimony of Mruczinski was that he had to do the work of chief cook Donald Smith who was drunk..... 19

(f) As to Mruczinski, suffice it to say that the entire record shows his incompetency and certainly the act of splitting a man's head open with a meat cleaver speaks for itself.... 19

(g) We add nothing to the obvious incompetence of defendant's representatives who after the assault put plaintiff and Mruczinski in the same room together and put them aboard the same plane to travel some 7,000 miles together..... 19

POINT IV. D. To show that the opinion is in accord with the previous opinions of the Second Circuit, we refer the Court to Point I-D of our Brief in the Court of Appeals.

"Aside from the reasons advanced as to an inquiry into the sanity of Mruczinski as a witness the trial court erred in ruling that 'the sanity of Mruczinski was not under inquiry in this lawsuit.'

As a matter of law a seaman who is insane aboard a tanker transporting high octane gasoline is a source of peril to those who sail with him rendering the vessel unseaworthy.

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Where the seaman is a second cook and the overwhelming weight of testimony shows that he was taken from jail by the port captain in Texas City at the time of the explosion, and that he was filthy at the time, and that during the entire time on the voyage to Manila, consuming some four months, he wore the same dirty shirt, pair of unmatched socks, shoes with one shoelace; talked about insanity in his family, never combed his hair or shaved, even slept in the one dirty set of clothes, never washed; did not do his work; was drunk from the time he was taken out of said jail in Texas City a great deal of the time until the vessel arrived at Manila where he split open the plaintiff's head with the sharp end of a meat cleaver when he was thoroughly intoxicated; had a revolver and a knife under his pillow; had assaulted a fellow crew member in the steward's department; had threatened the chief cook with death; had threatened the third mate with death for no reason; and that most of the steward's department saw the consul and tried to get off the ship because of him, enough evidence was offered to warrant a full inquiry as to his sanity and it was therefore error to strike out testimony of crew members that he was crazy, and that he was out of his head, and to refuse to permit Dr. Ambler to testify as to his opinion of the man's sanity where the doctor had actually seen him.

The shipowner does not fulfill its duty to furnish a seaman with a seaworthy crew where it supplies him with an insane second cook..... 20-21

POINT V. To show that substantial justice would not be done by a review at this time and to avoid repetition we respectfully refer the Court to examination of the entire plaintiff's brief and reply brief in the Court of Appeals..... 22

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POINT VI. The basic point that Judge Learned Hand decided was eminently correct—as between the shipowner who puts an insane man aboard ship and the seaman who must take the men placed aboard and who has no way of anticipating an insane man's conduct, ordinary principles of negligence have no application.

A tanker transporting high octane gasoline with an insane member of the crew taken from jail in Texas City at the time of the Texas City explosion is unseaworthy as to the crew as well as to hull and gear. We wonder what the insurers would cry if Mruczinski admittedly taken from jail in Texas City at the time of the Texas City disaster, had caused the ship to be blown skyward because of his insanity?..... 24

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

POINT I.

By statute appeals to the Supreme Court from a Circuit Court of Appeals can be only from final judgments or decrees. It is well settled that an order granting a new trial does not dispose of the case but leaves it open to the party to retry his case, and such an order is not appealable.

A judgment or decree to be final for this purpose must so terminate the litigation between the parties on the merits, that if there should be affirmance in the Federal Court, the Court below would have nothing to do but to execute the judgment or decree which it had already rendered. Judgments or decrees which *do not measure up to this standard are those which award a new trial.*

Tracy vs. *Hilcombe,* 24 How. 426;
Horton vs. *Moore,* 3 Wheat. 433;

Ranken vs. *Tennessee,* 11 Wall. 380;
Johnson vs. *Keith,* 117 U. S. 199;
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Gospel Army vs. *City of Los Angeles,* 331 U. S. 546;
Slaker vs. *O'Connor,* 278 U. S. 188.

In *Schlosser* vs. *Hemphill* (*supra*), Chief Justice Fuller wrote:

> "By its judgment the Supreme Court of Iowa reversed the decree of the Trial Court and remanded the cause. 'For further proceedings in harmony with the opinion of this Court.'
>
> We have heretofore held that a judgment couched in such terms is not final in such a sense as to sustain a writ of error from this Court."

In *Collins* v. *Miller,* 252 U. S. 361, Mr. Justice Brandeis wrote:

> "But this Court has jurisdiction on writ of error and appeal under that section as under others, only from final judgments. McLish *v.* Roff, 141 U. S. 661; Heike *v.* U. S., 217 U. S. 423."

Mr. Justice Frankfurter wrote later in *Republic National Gas Co.* at 334 U. S. 72:

> "Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages, Bruce *v.* Tobin, 245 U. S. 18; Martinez *v.* International Banking Corp., 220 U. S. 214; Mississippi C. R. Co. *v.* Smith, 295 U. S. 718. On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judg-

ment upon the mandate, the decree is regarded as concluding the case and is immediately reviewable; Typie Canoe County *v.* Lucas, 93 U. S. 108; Mourer *v.* Fletcher, 114 U. S. 127."

This rule of finality dates back to earlier decisions.

Baker v. *White,* 2 Otto 176; *Philips* v. *Gardner,* 1 McArthur 165, held that the judgment of a Circuit Court, reversing that of the District Court and ordering a new trial is not final, or reviewable on appeal.

Under section 22 of the judiciary act of 1789 error does not lie from a judgment of a Circuit Court reversing with costs a judgment of a District Court; such a judgment is not final.

Mayberry v. *Thompson,* 5 How. 121.

A decree of a Court of Appeals in favor of plaintiff but remanding the case to an inferior Court for further proceedings is not final, and no writ of errors lie to the Supreme Court.

Pepper v. *Dunlap,* 5 How. 51;
Winn v. *Jackson,* 12 Wheat. 135.

By the standards of all cases cited it is obvious that there has not been a final judgment since the Court of Appeals awarded a new trial. In addition:

1. *The full question of unseaworthiness has not been litigated as yet.*

2. *Plaintiff's damages consisting of a compound comminuted depressed fracture of the skull with bone fragments piercing the brain have not been assessed.*

3. *Many important records that were offered in evidence and were erroneously excluded have not yet appeared in the record.*

4. ***Request for punitive damages which the lower Court refused to consider and charge has not been litigated.*** As will be seen *infra*, this is a most important element.

5. Mruczinski was defendant's principal witness. Without his testimony a verdict in favor of the defendant could not stand. There is no question from records now available that he made a fraudulent claim against the Government according to the Veteran's records and that he fraudulently concealed important testimony.

As the basis for jurisdiction, petitioner states:

> "although the order of the Court of Appeals is not a final judgment, it presents important questions of law and issues fundamental to the further conduct of the case."
>
> *United States* v. *General Motors Corporation*, 323 U. S. 373, 377;
> *Land* v. *Dollar*, 330 U. S. 731, 734.
>
> Support for this statement is to be found in the authorities cited in support of this petition."

By this bit of verbal legerdemain, petitioner expects to transform jurisdiction of the Supreme Court into an open sesame where jurisdiction has been firmly limited.

Each term of Court brings the many who have to be turned away because of the statutory limitation. The reasons are we assume in most instances sound but do not appreciate the statutory limitation. (Parenthetically, it may be added, we too had to learn the hard way in a case several years back, that this rule is stringent.)

The above cases which petitioner uses as the basis of jurisdiction are needless to say rare exceptions where the

interest of the United States was involved. Further, in those cases there was no question that the matter had to be retried in many details. Here, petitioner uses the language of "fundamental to the further conduct of the case" as the basis of jurisdiction, and with this opening wedge, then seeks to overturn the opinion of the Court of Appeals with the hope that once certiorari is secured, that there never will be a new trial.

There is nothing to prevent a re-trial of all the issues, so that this Court will then be in a position to finally determine the matter. Petitioner's cost of re-trial is minor since its defense consisted except for medical testimony almost entirely of depositions which it can re-read. As for the medical testimony, most of this was cumulative since it was merely a repetition of medical reports and hospital records made in the regular course of business, *which plaintiff had offered in evidence.*

But because of the serious injuries to the plaintiff, we will now go into the case to show that on the merits, petitioner should not have certiorari under any circumstances.

POINT II.

A.

Petitioner is misleading this Court when it states that the issue of insanity was raised but by one small isolated ruling. The opening address of the plaintiff to the jury which devoted a substantial part to the insanity of Mruczinski put the petitioner and the Court on notice as to plaintiff's claim for indemnity based on Mruczinski's insanity and the proof of insanity to be offered.

The Court specifically ruled shortly after the trial was begun in answer to an exception taken by plaintiff that thereafter exceptions need not be taken to adverse rulings.

During the trial when the Court suppressed evidence bearing on Mruczinski's insanity and in effect overruled what it had previously ruled in plaintiff's opening address, it was fully aware that the rulings were adverse to plaintiff's principal contention in the case.

The following is part of plaintiff's opening address to the jury with specific reference to the insanity of Mruczinski which the plaintiff expected to prove.

(Pages 3-7):

> "From Texas City they went to the Philippines—they went to England and then they went to the Philippines. During that time Mruczinski, the second cook and baker, our proof will show, turned out to be a quarrelsome type. He started to have fights aboard ship. *He was inclined to the point where insanity should have been expected of this man. He even told members of the crew about the*

insanity. Now we say that if the officers on that ship did not know that they had an insane man aboard that vessel, that they should have known."

"Now that leaves us with three propositions, any one of which we claim will leave liability on the defendant. You must bear in mind, ladies and gentlemen of the jury, that when a crew is picked, those men are under articles; they no longer have the right to say 'I won't ship with this man; I won't ship with that man.' They depend upon the company and the officers to supply a seaworthy vessel and a seaworthy crew; and an insane man is not a seaworthy crew or any part of it. . . .

While they were on this ship, this man appeared dirty, slovenly, as an insane man is, and even talked of insanity about his family. . . .

and his background is going to be the most important part of the presentation in our case, *because we are going to show you that the man was insane, and if we prove to you that this man was insane, we are going to expect a verdict.* . . .

Now the reason he gave the right number but the wrong avenue, had they gone down there and made a check, as I have done, they would have come upon certain other facts. Those facts would have shown that they had, as I said, an insane man. There is no question that the sister,—they would have learned, was an inmate of an asylum——

Mr. Burke: Just a moment, your Honor, I will object to that kind of opening statement as highly inflammatory and not within the issues of this law suit. Mr. Fogler: It is definitely within the issues. The Court: Overruled. Mr. Burke: I respectfully except. Mr. Fogler: They would have found out about the sister, that that type of insanity which she had, schizophrenia paranoia, and she has been an inmate of an insane asylum. They should have started to inquire about this man, but no such thing took place."

"had got into many arguments because of the insanity from which he was suffering and under the delusions"

"Now all this is consistent with the delusions with which this man suffers. The sister has the same thing, schizophrenia, and this man has the same thing. And on board ship he was under the delusion that Keen owed him money, and we will show you that Mruczinski thought he won a lot of money and we will show you that he could not win any money; but he labored under the delusion that he won money in a card game on the ship, which is permitted by the company, and if the card game had been going on, the officers should have stopped it," . . .

(Page 10):

"And I want you to hear what he suspected about this man's insanity after working with him, and the reports that he made—*and Smith says that he reported this man's insane condition to the steward, because at one time Mruczinski took a knife and threatened him. And another instance, just before Keen got hit in the head, Mruczinski had taken a gun in a bar in the Philippines and shoved it into Smith's ribs, and when he came"* . . .

(Pages 14-15):

"Now, we come before you and we ask you to take these facts into consideration *and if you find the insanity* and if you find that the release that they executed at a time that they should not have executed any releases, *that you will find a verdict in behalf of the plaintiff for whatever amount that you feel that the damages are that will compensate him not only for the damages but for the pain and suffering and for everything else.*

I think that is the substance of what we expect to prove. Thank you.

POINT II.

B.

Petitioner by misleading the Court of Appeals that no exception was taken to the erroneous portion of the charge, succeeded in having this read into the opinion. Petitioner now seeks to mislead this Court when it knew that portion of the charge was taken bodily from petitioner's request No. 2 to charge and that the Trial Court granted a specific exception and even made sure that the exception was reserved after the charge.

The request to charge reads: Defendant's Request to Charge, (p. 1064):

> "2. The defendant was under no duty to inquire or examine into the physical or mental condition of a prospective employee, nor was the defendant an insurer of the physical or mental condition of a prospective employee or fellow servant."

(On p. 1071):

> **"The defendant's counsel, likewise, is granted an exception to the Court's refusal to charge as requested in all of the 15 requests except, of course, No. 2, and plaintiff's counsel is granted an exception to the Court's granting of request No. 2 on behalf of the defendant."**

The exception above given was preserved by the Court at the conclusion of the charge. (Page 1173 of the Record, page 25 of the Appendix):

> **"The Court: Now, gentlemen, without restating exceptions to the Court's rulings on your requests to charge, you may note on the record your exceptions to the Court's charge as given."**

The following at page 27 of the Minutes and Record shows that the Court almost at the start of the trial granted the plaintiff an exception to every adverse ruling during the trial without having to repeat "I respectfully except".

> "Q. Can you tell us about his actions with relation to fighting and what his habits were?
>
> Mr. Burke: Just a moment. I will object to it if your Honor please.
>
> The Court: Sustained.
>
> Q. Well, tell us about Johnny and his ways and his personality and the type of boy he was? A. *Brawling——*
>
> Mr. Burke: The same objection.
>
> The Court: Sustained. Strike out the answer.
>
> Mr. Fogler: *I respectfully except.*
>
> The Court: *Under the rule you have an exception to every adverse ruling during the course of the trial.*"

POINT III.

A.

It would be unfair to the seaman to permit this case to be reviewed at this time where Judge Hand with a unanimous Court ruled that because of rules of evidence peculiar to the law of the State of New York, the trial judge had made erroneous rulings in failing to admit records bearing on Mruczinski's insanity.

Especially unfair would it be where Mruczinski was defendant's principal witness and was not permitted to be impeached by said records.

Since Mruczinski appeared as a witness only by deposition taken several weeks before the trial plaintiff was

deprived of the opportunity of showing him to the Jury for the maniac that he was instead of the hero and veteran he was not. Because of the fraudulent concealment by Mruczinski at the time of taking the deposition which can be shown through the Veteran's Records, the defendant does not deserve to profit from this fraudulent testimony which the second trial will show in detail. Defendant's chief witness will be thoroughly discredited so that the Court will be in a position to reject his testimony in its entirety.

Without Mruczinski's testimony, a verdict in behalf of defendant could not stand up.

Judge Learned Hand wrote:

> "The plaintiff's effort throughout his case was to show that Mruczinski had been a drunken, dirty, quarrelsome seaman, who was inherently dangerous and habitually had possession of deadly weapons. This line of inquiry the plaintiff tried to extend to showing that he was actually insane; *and the evidence on that issue became entangled in the rules—some of them peculiar to the New York decisions—relating to the proof of insanity. Although the issue of insanity was relevant to Mruczinski's fitness, the plaintiff was of course limited to competent evidence; and, if nothing had appeared in the record beyond a few erroneous rulings on the competency of some of the evidence proferred, we should scarcely think it right to reverse*" (p. 553).

Since the plaintiff's counsel stated he would prove Mruczinski's insanity, the showing that the assailant used a meat cleaver to split open plaintiff's head did make a "*prima facie*" case.

It is common knowledge that combined with the act, heredity was important to consider. With the showing of the proferred evidence that the assailant's family was of the Jukes type, it is a matter of common knowledge that the insanity of Mruczinski might have been conclusively established.

Also because of Mruczinski's fraudulent concealment, it was learned only after the trial that while his mother had been incarcerated in prison and serving time for a felony, she was adjudged feebleminded and syphilitic, several years after Mruczinski was born.

The Veteran's records which showed that Mruczinski left the service **"at the convenience of the Government", will also show hospitalization for most of his record enlistment for removal of warty growths on his penis, a condition commonly associated with syphilis.**

Veteran's records of Mruczinski were not allowed to be offered in evidence by plaintiff despite the fact that they too would show fraud practiced on the Government by Mruczinski as well as the collecting of a pension on grounds concocted by the exconvict mother and himself.

The sister whose records were not allowed in evidence has been an inmate of an insane asylum for several years suffering with the same type of homicidal paranoia. Her level of intelligence from previous work records at Western Electric where the assailant worked is about the same as the brother.

The father whose record was not allowed in evidence has been arrested and convicted over 40 times.

All this is set forth to show that the proof that Mruczinski was thoroughly incompetent has a firm foundation, and medical testimony should have been permitted to connect up heredity with his condition.

POINT III.

B.

Certiorari would be unfair at this time without a retrial of all the issues because it was not known until after the trial that the reason why the entire steward's department was incompetent according to the overwhelming evidence in behalf of the defendant was because the defendant was interested only in getting about 40 of the American surplus tankers which it had placed under the Panamanian flag across to the Orient where the Americans were replaced by Chinese who brought high octane gasoline and oil to the Communists (Exhibit A).

Several days after the trial it was learned through published reports by the State Department the basic facts were, that Texas Company, in partnership with Standard Oil of California, did purchase about 40 of the latest type T2 tankers from the United States Government. After said purchase they were immediately put under the Panamanian flag. American crews were recruited in New York to sail these tankers from New York to Shanghai where they were replaced by Chinese and then flown back to New York, where they would subsequently repeat the same operation in defendant's employ.

All officers, including the Master, were aliens.

The officers signed articles giving them rights for personal injury only under the laws of Panama.

Separate articles were signed by the Americans which in effect gave them rights under the American Flag for personal injury and death.

The reason that the above is so important is that at the new trial the seaman will show that the shipowner did hire with a reckless disregard of the health and safety of its sea-

men because its sole intent was to reap the benefits of millions of dollars from this type of transaction. Shipowner's intent, as in days of old, was to recruit the crew regardless of danger (insurance covered the shipowner's risk of damage to its investment). It cared not one wit that the lives and health of the crew would be menaced by a homicidal maniac. That is why it took Mruczinski from jail in Texas City at the time of the Texas City explosion and put him aboard this tanker carrying high octane gasoline and it wants this court to say that the crew should have no compensatory protection from the acts of a madman recruited by the shipowner because the shipowner found it convenient and highly profitable to close its eyes in selecting a crew. It now urges this doctrine of voluntary blindness as a means of circumvention of duties consistent with its conduct in placing 40 American tankers under the Panamanian flag to reap benefits of the U. S. and avoid liability under our laws.

Judge Hand wrote:

> **"It would be a strange doctrine indeed that puts hull and gear above the health and safety of the seaman and fixes a much higher degree of responsibility for hull and gear on the shipowner than on the lives of the men who work both."**

This doctrine of unseaworthiness as applied in this case invokes no greater responsibility than the Jones Act has already done. In truth unseaworthiness has always made the proof difficult. But once unseaworthiness is established it rightfully holds the shipowner to full responsibility.

Actually it was to avoid the difficulty of proving a case of unseaworthiness in behalf of seamen that the Jones Act was passed.

The average case relies on the Jones Act for a single careless act on the part of a fellow servant which causes injury.

In the case at bar plaintiff had to show a course of conduct and was relegated to proof that was far more difficult. The problem was indeed knotty and weighty. Plaintiff

had to prove that the fellow servant was insane or so deficient in all his work that he was totally unsuited to do his job.

Plaintiff chose to prove that the fellow servant was insane. That this proof is far more involved than the average Jones Act case needs no comment. Nor can we see how this doctrine is going to expose the shipowner to any undue burdens. If the American Merchant Marine has so many insane seamen manning our ships, needless to add that the American Merchant Marine will fold under the weight of incompetence and not because of the rule of law promulgated by the Court of Appeals.

We conclude as to this that *the Court of Appeals has not changed its own previous decisions in cases of assault nor did it change the law of other circuits.*

The Court has merely restated what was inherent in decisions dealing with assault aboard ship, namely, that a vessel with an insane member of the crew is unseaworthy.

The ship is unseaworthy if said member is totally unsuited for the work and is thoroughly incompetent where he is a second cook, where he habitually arms himself with dangerous weapons, is so filthy that *in four months he was not known to change his clothes even when he retired, seldom in 4 months if ever bathed, spoke about insanity in his family, was quarrelsome and had fights, and then split plaintiff's head open with the sharp end of a meat cleaver, under circumstances that if death had ensued, would have been murder in the first degree.*

The Court held under the circumstances the shipowner has not fulfilled the right of a seaman to have the shipowner furnish him with a seaworthy ship and crew. A fellow seaman under articles can neither go home nor can he be expected to jump overboard to avoid contact with an insane crew member.

POINT IV.

The opinion is in line with the law expressed in t
Second Circuit as well as the Third and Ninth Circuit
There is no conflict. In fact it closely follows the rece
Spellman case of the Third Circuit Court of Appeals

To ascribe to Judge Learned Hand, Chief Jud
Swan, and Judge Augustus Hand who have made t
most substantial contributions to the admiralty law, a
intent to overrule that eminent court's own decisio
without a forthright statement to that effect is merel
unthinkable. The opinion written with customa
thoroughness and erudition delves into every authorit

A.

To show unseaworthiness due to an incompeten
captain in line with the *Spellman* case in the third ci
cuit, and unseaworthiness due to incompetency of th
entire steward's department in line with the nint
circuit, we call attention to Point II-B and Point II-
of our Brief in the Court of Appeals, as follows:

B.

On defendant's own testimony and indeed the basi
of its defense that the assault aboard ship arose out o
gambling aboard ship, the vessel was unseaworth
because the proof showed that the captain was not com
petent since he permitted full scale gambling to con
tinue, and enforced no discipline, and when advised
that Mruczinski had taken a gun and put it into a crew
member's ribs shortly before the assault on the plain
tiff he did not even investigate the facts surrounding
the gun incident.

Spellman v. *American Barge Line Co.* (*infra*)
Murphy v. *American Barge Line Co.* (*infra*).

(a) No qualifications of the Captain were shown other than that this was the first white crew that he had since 1943.

(b) He specifically admitted that the only crew that he had handled were Indians and Chinese whom he preferred.

"694. Q. Do you remember, while in Manila, Smith reporting that he had been threatened by Mruczinski with a gun in the Yellow Bar at Manila. A. *I remember someone talking about that. They were all drunk and Mruczinski grabbed a gun from a policeman.*

Q. Did someone wake you up to tell you about it? A. No. It was during the day that someone was talking about it.

699. . . . *I just heard the story as a rumor.*"

He admitted that in London, two messmen and a utility man all from the Steward's Department contacted the American Consul and tried to get off because of the *Steward but it might have been because of the Steward and Mruczinski.*

(c) Although there is some question as to the exact time when he heard the rumor that Mruczinski had put a gun into Smith's ribs a fair reading of the deposition disclosed that it must have been prior to the time of the assault upon Keen.

It is to be borne in mind that the deposition was taken in Africa by the defendant on May 4th, 1951 pursuant to a notice had April 27, 1951 and that the trial was started on May 16, 1951 although the Action had been started on September 29, 1949 by the service of the Summons and Complaint.

It is also very significant that the deposition was not certified until the 5th day of May, 1951 at Mombasa, Africa. Obviously by the time of certification and the time when it would be received in the United States practically no time had elapsed before the trial had begun.

It is submitted that where the defendant prefers to take a deposition by so vital a witness as the Master that no ambiguity should be reserved in its favor. It would be unjust to hold otherwise since the plaintiff on the eve of trial in New York and served with such short notice cannot be expected to take any risks which the defendant's tardiness has occasioned.

If there was any ambiguity as to the time which a fair reading of the deposition would indicate that the notice to the Master of this incident was prior to the assault upon plaintiff, that ambiguity should be resolved against the defendant who took the deposition under these circumstances.

It is unnecessary to decide this point since a fair reading of the deposition certainly discloses that all parties were talking about the time prior to the assault in question; otherwise it is quite obvious that learned counsel selected by the defendant would have made a strong issue of the fact that the notice did not come to the Master's attention until after the assault.

C.

Aside from plaintiff's overwhelming evidence even on defendant's own testimony the unseaworthiness due to an incompetent steward's department was fully established. The testimony by deposition of the steward, the master, and Mruczinski established that not a single, solitary member of the steward's department was competent.

(a) Steward testified that the two messmen and the utility men were inexperienced (pp. 715, 716).

"A. There was one Italian lad on there, a messman. I never asked him. But I figured he was probably making his first trip to sea. He just didn't seem to know his way around on the ship. A couple

of other messmen that were even younger than he was—(Page 717) I figured if they had been to sea before, it couldn't have been more than one or two trips, just by their movements and actions around the vessel.''

(b) The Captain had testified that he recalled that the messman and the utility man wanted to get off the ship in England because of the Steward and it could have been because of the Steward and Mruczinski (694).

(c) Mruczinski, the second cook, stated that the reason he made the trip was to get some experience so that he could get into the Union (Page 748).

(d) According to Mruczinski, messman Smith with whom he had a fight didn't give the men good service. This fight was right near the Captain and the Steward stopped it. It was then stated that the Captain and the Steward stopped the fight (Page 795).

(e) The testimony of Mruczinski was that he had to do the work of chief cook Donald Smith who was drunk.

(f) As to Mruczinski, suffice it to say that the entire record shows his incompetency and certainly the act of splitting a man's head open with a meat cleaver speaks for itself.

(g) We add nothing to the obvious incompetence of defendant's representatives who after the assault put plaintiff and Mruczinski in the same room together and put them aboard the same plane to travel some 7,000 miles together.

Thus the defendant's own testimony leads to the inescapable conclusion that the entire steward's department was incompetent, with the result that unseaworthiness was completely established.

POINT IV.

D.

To show that the opinion is in accord with the previous opinions of the Second Circuit, we refer the Court to Point I D of our Brief in the Court of Appeals.

"Aside from the reasons advanced as to an inquiry into the sanity of Mruczinski as a witness the trial court erred in ruling that 'the sanity of Mruczinski was not under inquiry in this lawsuit.'

As a matter of law a seaman who is insane aboard a tanker transporting high octane gasoline is a source of peril to those who sail with him rendering the vessel unseaworthy.

Where the seaman is a second cook and the overwhelming weight of testimony shows that he was taken from jail by the port captain in Texas City at the time of the explosion, and that he was filthy at the time, and that during the entire time on the voyage to Manila, consuming some four months, he wore the same dirty shirt, pair of unmatched socks, shoes with one shoelace; talked about insanity in his family, never combed his hair or shaved, even slept in the one dirty set of clothes, never washed; did not do his work; was drunk from the time he was taken out of said jail in Texas City a great deal of the time until the vessel arrived at Manila where he split open the plaintiff's head with the sharp end of a meat cleaver when he was thoroughly intoxicated; had a revolver and a knife under his pillow; had assaulted a fellow crew member in the steward's depart-

ment; had threatened the chief cook with death, had threatened the third mate with death for no reason; and that most of the steward's department saw the consul and tried to get off the ship because of him, enough evidence was offered to warrant a full inquiry as to his sanity and it was therefore error to strike out testimony of crew members that he was crazy, and that he was out of his head, and to refuse to permit Dr. Ambler to testify as to his opinion of the man's sanity where the doctor had actually seen him.

The shipowner does not fulfill its duty to furnish a seaman with a seaworthy crew where it supplies him with an insane second cook.

Kyriakos vs. *Goulandris,* 151 F. (2d) 132;
Steamer H. A. Scandrett, 87 F. (2d) 711.

Smoot on the Law of Insanity points out how a visit to any institution for the treatment of the insane will disclose that the cardinal point to be observed about the insane is the filth which these unfortunates will keep themselves in, and the neglected condition of the clothing and person, all pointing to the existence of an inflamed mind."

POINT V.

To show that substantial justice would not be done by a review at this time and to avoid repetition we respectfully refer the Court to examination of the entire plaintiff's brief and reply brief in the Court of Appeals.

We call attention to Point IA. There we have dealt at length with the dual role played by Mruczinski the assailant, and Mruczinski defendant's principal witness. Sanity was the subject of the lawsuit. Insanity was also the principal point in the impeachment of Mruczinski.

"(a) We are reinforced in this conclusion when this testimony is at wide variance with the written reports of the Master, the First Mate, and an eye-witness, which were made in the regular course of business and were in the files of the defendant. Strengthening our conclusions is defendant's witness Lucius Collins, claim agent, who at the time of settlement negotiations had not one word to say in support of Mruczinski's apparently newly fashioned defense.

(b) Aside from the many contradictions in Murczinski's deposition, the description as to the steps which Mruczinski took to split plaintiff's head open with the meat cleaver would in itself raise a serious question as to witness' sanity.

(c) What testimony the Court permitted of witnesses Shaffer, Phillip, Smith, Barbito and Moore prior to its final ruling that Mruczinski's sanity was not in issue gave abundant independent proof that Mruczinski as a witness was one whose sanity was in such doubt that a full inquiry should have been permitted.

In *Ellarson* v. *Ellarson* (*supra*), the Court wrote:

> 'The weight of authority seems to be that the alleged insanity of a witness is a question of fact

and must be tried upon proper evidence, and the character of the evidence on this question cannot be different however the question is raised. It is proper to go into the history of the supposed insane person's mind, before, at, and after the occurrence and at the time of trial. *It is held that though this raised a collateral issue, which may take a long time to try, yet if necessary to the full development of the truth, the party charging insanity is entitled to an opportunity to prove it if he can.'*

In *U. S.* v. *Hiss* (*supra*), Judge Goddard wrote:

'It is apparent that the outcome of this trial is dependent to a great extent upon the testimony of one man—Whitaker Chambers. Mr. Chamber's credibility is one of the major issues upon which the jury must pass. The opinion of the jury—formed upon their evaluations of all the evidence laid before them —is the decisive authority on this question as on all questions of fact.

The existence of insanity or mental derangement is admissible for the purpose of discrediting a witness. Evidence of insanity is not merely for the judge on the preliminary question of competency, but goes to the jury to affect credibility.'

In Wigmore on Evidence (Vol. 2, sec. 932) it is said:

'The existence of a derangement of the sort termed insanity is admissible to discredit, provided, that it affected the witness *at the time of the affair testified to, or while on the stand, or in the meantime so as to cripple his powers of recollection.'* ''

POINT VI.

The basic point that Judge Learned Hand decided was eminently correct—as between the shipowner who puts an insane man aboard ship and the seaman who must take the men placed aboard and who has no way of anticipating an insane man's conduct, ordinary principles of negligence have no application.

A tanker transporting high octane gasoline with an insane member of the crew taken from jail in Texas City at the time of the Texas City explosion is unseaworthy as to the crew as well as to hull and gear. We wonder what the insurers would cry if Mruczinski admittedly taken from jail in Texas City at the time of the Texas City disaster, had caused the ship to be blown skyward because of his insanity?

We also wonder how on page 12 the petitioner can talk about its concern for American labor when it purchased American ships at a discount, placed them under Panamanian registry and replaced American crews with Chinese. Its defense was just as consistent.

Respectfully submitted,

HENRY FOGLER,
Counsel for Respondent.

Appendix A.

Notice To

Amended Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

GUY B. KEEN,
Plaintiff,

against

OVERSEAS TANKSHIP CORPORATION,
Defendant.

Sirs:

PLEASE TAKE NOTICE, that upon the trial of the action the plaintiff will move to amend the complaint as follows:

EIGHTH: That defendant did purchase from the United States Government about 40 modern type tankers, and all were put under the Panamanian flag registry so that American seamen who were signed thereon had no benefits of U. S. Marine Hospital treatment for illness or injuries suffered in its employ, and that in order to transport said 40 modern type tankers to the Orient with cargoes of oil and high octane gasoline, where the entire unlicensed American personnel aboard ship would be replaced by Chinese at far lower wages and lower working condition, the defendant in order to reap the benefits of this inequitable transaction, did hire plaintiff's crew members with a wilful and wanton disregard of his life and limb, and did hire an unseaworthy crew, and did hire an incompetent master and officers, who were aliens and did neither understand the Americans as to proper discipline nor did they make any such effort to enforce discipline, since their primary concern was merely

to deliver said tankers to the Orient where the said Americans would be replaced by Orientals under whose command the said alien officers were accustomed to working, and that as a result thereof, the master and the officers did cause and permit gambling for large stakes to continue for many hours of the day, and instead of the men getting rest and relaxation during periods off watch, tempers were caused to flare, and/or grievances on the part of crew member Mruczinski were caused to precipitate arguments which resulted in the said assault upon plaintiff; that defendant in wanton and wilful disregard of the health and safety of the plaintiff, did persist in keeping in its employ said Mruczinski, and in fact did take said Mruczinski from jail in Texas City, at or about the time of the Texas City explosion, along with Mruczinski's "buddy", one Tetterton, when it knew that said vessel was to transport oil and high octane gasoline to the Orient, and said conduct did render the vessel unseaworthy as to hull, gear, and personnel; that since the plaintiff did not know from any provable source about the transaction with the United States Government until several days after the first trial, when full details were published in the New York World Telegram on June 4th, 1951, a photosatic copy of which is attached herewith, as to the reasons for wantonly and wilfully hiring an unseaworthy crew, he was prejudiced at the first trial in his inability to prove the motive for said reckless, wilful, and wanton hiring and maintaining in its employ of the said Mruczinski, and with this notice plaintiff serves notice of intention to seek substantial punitive damages for plaintiff's injuries consisting of a compound, comminuted, depressed fracture of the skull with bone fragments piercing the brain, laceration of the brain, infection of the brain after the first brain operation wherein the scalp caused to swell over 3 inches, and a second brain operation after air was injected into the spine and brain to take proper pneumoencepalograms, wherein a plate was put into plaintiff's skull.

That after the said first assault, plaintiff was rendered unconscious for about 5 hours after his head was split open

with the sharp end of the meat cleaver, and did suffer severe and permanent personal injuries for which he was hospitalized in Manila, and about five days thereafter upon release of plaintiff from said hospital, he was thereafter caused to be quartered by the defendant, its officers, agents and employees, in the same room with the said assailant, John Peter Mruczinski, on the pretext that they were "buddies", when it knew that either plaintiff would be killed or further seriously injured by said Mruczinski, who by the use of said meat cleaver had demonstrated beyond a peradventure of doubt insane tendencies, and that because of said wanton, and wilful disregard of plaintiff's health and safety, and while in said room plaintiff was caused to be further assaulted by said Mruczinski as a result of which he was rendered unconscious and his injuries were caused to be further aggravated; and that even then, the plaintiff and said Mruczinski were transported by plane together from Manila to New York, the same city where the defendant, the said American-owned Overseas Tankship Corporation, had its principal place of business, and even in New York, the defendant did cause and permit plaintiff and Mruczinski to be quartered together.

NINTH: That said aggravation and original injuries hereinbefore set forth was caused by the carelessness and gross wanton negligence of the defendant, its agents, servants and employees and the unseaworthiness of the said vessel in causing and permitting the plaintiff to be struck in the manner described; and that in addition to the negligence and wanton misconduct heretofore set forth, in the complaint and in this notice, and did cause, allow and permit the plaintiff and the said Mruczinski to be together at times when Mruczinski was intoxicated and did cause plaintiff to be struck in the manner heretofore set forth which did aggravate the injuries inflicted on the first occasion and the defendant was thus guilty of gross and wanton negligence; in that the defendant, its agents, servants and employees failed to promulgate and enforce proper and safe rules under the circumstances described above; in that the

defendant, its agents, servants and employees failed to take proper precautions in preventing the said second assault, and further that by reason of said acts defendant was guilty of negligence as a matter of law, as well as of fact.

TENTH: That by reason of the foregoing, plaintiff's injuries were caused and aggravated and plaintiff claims punitive and compensatory damages for its negligence and gross and wanton negligence in the additional sum of $100,000.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $275,000 as damages, together with the costs and disbursements of this action.

Yours, etc.,

HENRY FOGLER,
Attorney for Plaintiff,
24 Stone Street,
New York City.

Article, Annexed ~~to Complaint~~.

NEW YORK WORLD-TELEGRAM AND SUN,

MONDAY, JUNE 4, 1951

SHIP FLEW PANAMA FLAG TO DODGE BAN ON OIL

By JAMES DANIEL,
Scripps-Howard Staff Writer.

WASHINGTON, June 4.—The American-owned Overseas Tankship Corp. confirms that one of its ships, registered under the flag of Panama, delivered gasoline and Diesel oil to Hong Kong last February.

This was after the issuance of an order Dec. 8 forbidding American vessels registered under the U. S. flag to deliver strategic materials, including petroleum products to Hong Kong because of the danger of such goods assisting Red China's war effort.

W. L. Stine, superintendent and manager of operations for the tanker company, said his company and a sister British corporation operate 40 tankers carrying oil to all parts of the world from the U. S. oil concession at Bahrein on the Persian Gulf. He said he believed deliveries of petroleum to Hong Kong were "infrequent."

The Navy here has been declining to make public the names of merchant vessels observed trading with China, on the ground that this might embarrass sources of information.

The information about the Overseas Tankship Corp. vessel was disclosed in a clipping from a Hong Kong newspaper received here.

The paper, the South China Post, on Feb. 10 reported: "The Panamanian steamer *Cedar Breaks* (Capt. Nils Jespersen) of Caltex (China) Ltd., brought 1856 tons of petrol and 3332 tons of Diesel oil from Bahrein via Manila on Thursday."

Maritime Administration records list the *Cedar Breaks* as having been built in 1944 by the U. S. government. The tanker was sold after the war to Overseas Tankship Corp. Thirty-nine other modern-type tankers were bought by the same corporation. All were put under Panama flag registry.

(Jim G. Lucas, Scripps-Howard staff writer, recently reported that Navy patrol planes had photographed hundreds of Panama-flag vessels engaged in trade with China, many believed by the Navy to be American-owned.)

Mr. Stine was telephoned at Overseas Tankship's 551 Fifth Ave., New York, headquarters. He said the corporation is the transporting side of Caltex, the joint corporation formed by Standard Oil of California and the Texas Co. to exploit the American oil concession at Bahrein.

Seventeen of the tankers bought from the U. S. government have been chartered or sold to "Overseas Tankship Corp., U. K." (for United Kingdom), the British sister corporation.